

## JOINT COMMITTEE ON PUBLIC ACCOUNT AND AUDIT

### ATTORNEY-GENERAL'S PORTFOLIO

#### JCPAA INQUIRY INTO GOVERNANCE IN THE STEWARDSHIP OF PUBLIC RESOURCES—BASED ON AUDITOR-GENERAL REPORT 11 (2019-20), IMPLEMENTATION OF THE DIGITAL CONTINUITY 2020 POLICY

##### National Archives of Australia

##### JCPAA21-11 – Official Records held by the Crown

**The JCPAA asked the following follow-up question from 29 April 2021:**

1. In response to Question JCPAA21-06, the Director of the NAA stated that: *“At this point in time, the Director-General of the NAAA operates in the understanding that he does not have jurisdiction over the official records held by Her Majesty The Queen”*.
  - a. Why does the Director-General operate under that understanding? What is the basis for the “understanding”?
  - b. Has the Director-General sought or received legal advice on this matter? If not, why not?
  - c. Is the Director-General aware of any legal advice on this matter provided to the NAA, or to any other Australian Government Department or agency?
  - d. Given the High Court decision in *Hocking v DG National Archives of Australia* [2020] HCA 19 clarified and expanded the meaning of “Commonwealth record” to be broader than the understanding the Director-General had previously operated on, can the Director-General be confident that his current understanding is not similarly affected by a misunderstanding of the law? What level of confidence does the Director have in respect of his current “understanding” of the law in this instance?
  - e. Will the Director-General seek legal advice as to whether records of the Queen are “property of the Commonwealth” and therefore fall within the definition of a “Commonwealth record”, and, as such, ought to be covered by the NAA’s digital policy? If not why not?
  - f. The Director-General’s answer states that documents pertaining to Australia’s governance are “managed by” the Queen, but does not say who owns the documents. Who does the Director-General believe owns these important documents pertaining to Australia’s history?
  - g. Has the Director written to or consulted the Queen seeking advice or assurance that the documents she currently retains and manages in relation to the governance of Australia are properly preserved and stored, and available in digital format?

**The response to the honourable member’s question is as follows:**

- a. It is the Director-General’s view that, for the purposes of the *Archives Act 1983* (Archives Act), records created or received by Her Majesty The Queen are records that should be held by The Royal Archives. While Her Majesty The Queen may choose to donate records held by them to the National Archives of Australia, the statutory powers and functions of the National Archives of Australia do not compel them to do so. Records that have been received by the Commonwealth from Her Majesty The Queen are considered Commonwealth records for the purposes of the Archives Act.

- b. No, this is a policy position of the Director-General and the National Archives of Australia. Legal advice may be sought in future if necessary.
- c. No.
- d. It is the Director-General's view that this policy position is consistent with the finding of *Hocking v DG National Archives of Australia* [2020] HCA 19.
- e. Please see response to b.
- f. The Director-General considers that Her Majesty The Queen has the relevant power to control the custody of the records.
- g. The Director-General's functions under subsection 5(2) of the *Archives Act 1983* extend to the records received by Commonwealth institutions, which are archival resources of the Commonwealth.

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##### National Archives of Australia

##### JCPAA21-12 – Correspondence with the Crown

**The JCPAA asked the following follow-up question from 29 April 2021:**

2. In response to Question JCPAA21-10, the NAA stated that they are continuing to “*consider the correspondence and sensitivities affecting key stakeholders*” in releasing the correspondence between the Queen and former Governor General’s Casey, Hasluck, Cowen, Stephen, Hayden and Deane:
  - a. Can the Director provide an assurance that the documents in question are not at risk of deterioration given the NAA’s well-publicised funding crisis?
  - b. Can the Director advise if these documents are or will be stored in a digital format?
  - c. Given at least four of these former Governor-Generals have died, what particular ‘sensitivities’ is the NAA concerned about?
  - d. Can the Director please provide a list of stakeholders who are being consulted?
  - e. Shouldn’t the NAA be more concerned with applying the law than with the ‘sensitivities’ of the Queen or other stakeholders?

**The response to the honourable member’s question is as follows:**

- a. The records that contain the correspondence between Her Majesty The Queen and former Governor-General’s Lord Casey, Sir Paul Hasluck, Sir Zelman Cowen, Sir Ninian Stephen, The Hon William Hayden and Sir William Deane, have been stored in archival storage with minimal temperature and humidity variations to ensure the ongoing preservation and accessibility of the records. The records are in very good condition. The National Archives of Australia (National Archives) has not identified any preservation concerns.
- b. The records were received in a physical format and the National Archives continues to preserve them. Once the examination of these records is complete, the material that can be released under the *Archives Act 1983* will be digitised, and a copy will be made available to researchers through the National Archives’ database RecordSearch.
- c. The sensitivities that the National Archives is considering relate mainly to the following exemption categories outlined in section 33 of the *Archives Act 1983*:
  - disclosure could damage Australia’s security, defence or international relations – s33(1)(a)
  - disclosure would unreasonably disclose information about the personal affairs of a person – 33(1)(g)

- disclosure would, or could reasonably be expected to, have an adverse effect on a person's lawful business or professional affairs or on the business, commercial or financial affairs of an organisation – 33(1)(j)
  - would be privileged from production in legal proceedings on the ground of legal professional privilege and its disclosure would be contrary to the public interest – 33(2).
- d. The National Archives has consulted with the Official Secretary of the Governor General (OSGG), Department of Foreign Affairs and Trade (DFAT), Attorney-General's Department, and Australian Government Solicitors. The OSGG has sought the views of the Royal Household, and DFAT has sought advice from the United Kingdom's Foreign, Commonwealth and Development Office.
- e. In examining the records of former Governor-General's and Her Majesty The Queen, the National Archives is undertaking its examination of these records in accordance with the relevant laws, in particular the *Archives Act 1983*.

Under section 35 of the *Archives Act 1983*, the Director-General, in consultation with the responsible Minister or a person authorised by the responsible Minister, shall make arrangements for determining those Commonwealth records in the open access period that should be treated as exempt records. These arrangements specify the consultation between the National Archives and agencies that should be undertaken to determine which records, or parts of records, should be exempt from public access.

The National Archives' consultation with agencies has been undertaken under these arrangements.